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Citation: Hamilton, Frances (2019) Rights for LGBTQ persons: MB v Secretary of State for Work and Pensions. Family Law, 2019 (Jan). pp. 54-56. ISSN 0014-7281

Published by: Jordan

URL:

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MB V Secretary of State for Work and Pensions [Case C-451/16]: Further Development from the European Court of Justice of rights for LGBTQ persons.

In the case of MB v Secretary of State for Work and Pensions [Case C-451/16] [2018] Pens. L.R. 17, the European Court of Justice ('CJEU') determined that the requirement of the Gender Recognition Act 2004 ('GRA 2004'), which required trans persons to annul their marriage before they would be granted a full Gender Recognition Certificate in their new sex (prior to same-sex marriage being legalised in 2013), which was also necessary to claim state pension benefits for women from the age of 60, contravened Article 4 Council Directive 79//7/EEC non-discrimination provisions. The consequence of the GRA 2004 provisions meant that many individuals never obtained gender recognition certificates as they did not want to annul their marriages. This subsequently meant that they could not exercise the right to claim the state pension at the lower age of 60 previously given to women (where men had to wait until 65). The far reaching judgment from the CJEU demonstrates again that the expanding nature of EU family law. The concept of EU citizenship is leading to an ever greater array of rights being given to EU citizens. Following Brexit UK citizens will no longer be able to benefit from such interventions from the CJEU.

Introduction

The case of *MB v Secretary of State for Work and Pensions [Case C-451/16] [2018] Pens. L.R. 17* ('the MB case') concerned a trans person who was born a male in 1948 and married in 1974. She subsequently underwent gender reassignment surgery in 1995. When she sought to claim her state pension at the age of 60 in 2008 she was rejected. At the time (prior to state pension reform) whilst women were entitled to access their pensions from the age of 60, men had to wait until 65 (s44 Social Security Contributions Act 1992 read in conjunction with s122 of that Act and with Schedule 4 paragraph 1 of the Pensions Act 1995). MB was rejected on the basis that the UK state still officially classified her as a male. This was because MB had never obtained a full Gender Recognition Certificate. MB had not completed this legal process because the Gender Recognition Act ('GRA 2004') in force at the time, prior to the legalisation of same-sex marriage in 2013, required a married applicant to annul their marriage. MB did not wish to annul her marriage.

At the time the GRA was enacted in 2004 the UK had only legalised civil partnership, by way of the Civil Partnership Act 2004, and not same-sex marriage. In 2004 it was considered by some that although civil partnerships had given nearly the same legal rights to same-sex couples, that UK society was not ready for same-sex marriage. Jacqui Smith (then Deputy Minister for Women and Equality) stated in the House of Commons that 'I recognise that Hon. Members on both sides of the House understand and feel very strongly about specific religious connotations of marriage' (See Hansard, HC,

12 October 2004, Col 177). The GRA 2004 therefore provided that in order to obtain a full gender recognition certificate not only did strict medical conditions have to be met but that also that a married applicant had to have their marriage annulled by the court (section 4(3) and section 5 GRA 2004). This provision was only reformed following the Marriage (Same Sex Couples) Act 2013, Schedule 5 of which amended s4 GRA 2004 to provide that a full gender recognition certificate could be issued to a married applicant if their spouse consents.

The original requirements of the GRA 2004 requiring a marriage to be annulled before a full gender recognition certificate could be issued required a very 'painful and sensitive decision' for many trans persons in stable marriages who had no desire to divorce (see for comment <http://www.journalonline.co.uk/Magazine/54-10/1007115.aspx>). Whilst a consequence of the Same Sex Marriage 2013 provisions is that 'trans persons are no longer forced to choose between the legal recognition of their relationship or of their gender identity' (See Charlotte Bendall, 'Publication Review. From Civil Partnership to Same Sex Marriage: Interdisciplinary Reflections' Eds, by Nicola Barker and Daniel Monk, Int. J.L.C. 2017, 13(3), 429-432 at page 430) the *MB* case demonstrates the continued impact of the previous legislation. MB's case will be one of many where trans persons continue to be affected. Further in Northern Ireland whilst civil partnership legislation has been in force since 2004, there continues to be no recognition of same-sex marriage.

Role of the European Court of Justice ('CJEU')

In the *MB* case before the CJEU the question raised was whether the UK legislation was discriminatory on the grounds of sex, contrary to Article 4 of Council Directive 79/7/EEC. This directive provides that there should be a principle of equal treatment and 'no discrimination whatsoever on ground of sex either directly or indirectly...' On behalf of the UK Secretary of State for Work and Pensions the argument was made that it should be for Member States 'to determine the conditions under which a person's change of gender may be legally recognised' (paragraph 23 *MB* judgment). It was argued that this should not only relate to physical and psychological criteria, but also criteria relating to marital status (paragraph 23 *MB* judgment). The UK government relied upon previous case law from the CJEU which the UK government argued had accorded an area of discretion to Member State's in this area (Judgement 7 January 2004, *KB v NHS Pensions Agency (C-117-01) EU: C: 2004: 7 [2004] 1 CMLR 28* at paragraph 35 and of 27 April 2006, *Richards v Secretary of State of Work and Pensions (C243-04) EU:C: 2006: 256 [2006] 2 CMLR 49* at paragraph 21).

According an area of discretion to Member States in sensitive areas of family law also reflects the position of the European Court of Human Rights ('ECtHR'). Although the ECtHR has made important judgements in favour of recognising trans persons rights (for example see *Christine Goodwin v UK*

Application 28957/95, Judgment of 11th July 2002) the ECtHR continues to allow Member States to make recognition of a change of gender conditional on annulment of that person's marriage (16 July 2014, *Hamalainen v Finland* (37359/09) [2015] 1 FCR 379 / 37 BHRC 55). In the related area of same-sex marriage, ultimately the ECtHR has left this to the discretion of the Member State (*Schalk and Kopf v Austria* (App. No. 30141/04)). Although the ECtHR has recognised that a 'co-habiting same-sex couple living in a stable relationship' fall under the notion of 'family life' (*Schalk and Kopf v Austria* at paragraph 94), and the ECtHR has accorded same-sex couples some right of legal protection, dependent upon the factual circumstances existing upon the ground of that member state (*Oliari v Italy* App Nos 18766/11 and 36030/11 (ECtHR, 31 July 2015)), ultimately the ECtHR has stopped short of recognising same-sex marriage due to concerns about imposing upon Member States' 'deep rooted social and cultural' concerns (*Schalk and Kopf v Austria* para 62). This in turn leads to a wide margin of appreciation, or area of discretion being granted to Member States (see *Schalk and Kopf v Austria* para 105) when it comes to recognising same-sex marriage.

However, although traditionally the EU has similarly always determined that subsidiarity should take precedence (see for instance commentary on art 9 of the Charter of Fundamental Rights of the European Union which states that Member States do not have an 'explicit requirement to facilitate [same-sex] marriages') a recent case has demonstrated that the CJEU is prepared to make far reaching judgments in this area. In the case of C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Others* ('*Coman*') the CJEU determined that a non-EU citizen same-sex spouse should be granted the right of permanent residence when their EU citizen same-sex spouse relocated to a different state in the EU. This is the case even where the couple relocate to another jurisdiction (in the *Coman* case Romania) which does not allow any recognition of same-sex partnerships. Although the CJEU judgement in no way required EU states to recognise same-sex marriage, it has greatly enhanced EU free movement rights for same sex couples. It has also set a precedent for the CJEU in extending rights for same-sex couples and GLBTQ individuals more broadly.

In *MB* the CJEU ultimately determined that although Member States continue to have authority and competence when determining matters of civil status and legal recognition of gender, Member States must exercise this authority in such a way to comply with provisions relating to the principle of non-discrimination. In *MB* close examination was made by the CJEU of Article 4 of Directive 79/7 which prohibits all forms of discrimination on grounds of sex as regards social security. Ultimately the GRA section 4 conditions which required an annulment of marriage as a condition to access a state pension for persons who had changed sex, was considered to be direct discrimination on the grounds of sex (see *MB* paragraph 29).

Conclusion

The *MB* case is noteworthy on a number of different levels. The judgment itself extends the rights of trans persons who under the GRA 2004 were required to annul their marriages in order to access state retirement benefits from the age of 60 for women. As many trans persons, including the applicant in the *MB* case, did not wish to annul their marriages they were not able to obtain a Gender Recognition certificate or subsequently the state pension entitlements which all other women could access. This has been found by the CJEU to be direct discrimination contrary to Article 4 of Directive 79/7 which prohibits all forms of discrimination on grounds of sex as regards social security (see *MB* paragraph 29). On another level the *MB* case alongside the recent *Coman* judgment represents a further intervention by the CJEU in the development of rights for LGBTQ individuals. This again demonstrates the ever expanding nature of EU family law. The concept of EU citizenship is leading to an ever greater array of rights being given to EU citizens. Following Brexit UK citizens will no longer be able to benefit from such interventions from the CJEU.